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IN THE

SUPREME COURT OF THE UNITED STATES

No. 87-1532

BILL ARMONTROUT, WARDEN,

Petitioner,

vs.

LEATRICE LITTLE,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

TOBY H. HOLLANDER
Counsel for Respondent

145 Lisbon, 7th Fl.
Lewiston, Maine 04240
(207) 784-1558

Comes now Respondent, Leatrice Little, by and through his Counsel, Toby H. Hollander, and moves this Court, pursuant to Rule 46, Rules of the Supreme Court of the United States, and moves this Honorable Court for leave to proceed in forma pauperis.

Respondent's affidavit is in support thereof is attached hereto.

Respondent proceeded in forma pauperis in the state courts below. No request to proceed in forma pauperis was presented in the federal courts below.

The Petitioner, by counsel, Patrick L. King, Esq., has authorized counsel for Respondent to state that Petitioner has no objection to the granting of this Motion.

WHEREFORE, Respondent prays that this Court grant him leave to proceed in forma pauperis.

TOBY H. HOLLANDER
Counsel for Respondent

Toby H. Hollander
145 Lisbon St., 7th Fl.
Lewiston, ME 04240
(207) 784-1558

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Leatrice Little, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to the redress granted by the Circuit Court of Appeals.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in the United States Supreme Court are true.

1. Are you presently employed? Yes.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

$5.40 per hour: $936 per month
Old Heritage Advertising and Publishing Company
14535 Manchester Road, Suite 203
Manchester, Missouri.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

3. Do you own any cash or checking or savings account? Yes.

a. If the answer is yes, state the total value of the items owned. $300.00.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding oridinary household furnishings and clothing)? Yes

a. If the answer is yes, describe the property and state its approximate value.

76 Jaguar: Fair market value $5500.00-debt outstanding= $7400.00
U.S. Savings Bonds-- $800.00
1976 Pontiac LeMans-- $400.00
1987 Buick LeSabre-- $00.00 Equity (Fair market value is $12,000, balance on secured note is $12,500.00)

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Mary Little (wife)
Casey Hood (step-son)
Tara Little (daughter)
My wife is due to deliver our second child in August, 1988.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

x Leatrice L Little
Leatrice Little

Subscribed and sworn to before me this 19th day of May, 1988.

Notary Public

My Commission expires: _____.

BEST AVAILABLE COPY

Comes now the Respondent, by and through his counsel, Toby H. Hollander, Esq., and pursuant to Rule 46.7, Rules of the Supreme Court of the United States, and moves this Court to appoint Toby H. Hollander to represent Respondent in this Court pursuant to the provisions of the Criminal Justice Act of 1964, 18 U.S.C. Section 3006A. Said counsel has represented Respondent throughout the habeas corpus proceedings in the courts below and is a member of the Bar of this Court.

Respondent has filed contemporaneously herewith his Motion to Proceed In Forma Pauperis and affidavit in support thereof demonstrating his indigence and financial inability to obtain adequate representation or to meet the necessary expenses in this Court.

WHEREFORE, Respondent prays that this Court appoint Toby H. Hollander, Esq., to represent Respondent in this Court pursuant to the Criminal Justice Act of 1964.

TOBY H. HOLLANDER
Counsel for Respondent

Toby H. Hollander
145 Lisbon St., 7th Fl.
Lewiston, ME 04240
(207) 784-1558

IN THE

SUPREME COURT OF THE UNITED STATES

No. 87-1532

BILL ARMONTROUT, WARDEN,

Petitioner,

vs.

LEATRICE LITTLE,

Respondent.

RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TOBY H. HOLLANDER
Counsel for Respondent

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QUESTIONS PRESENTED BY THE PETITION

I.

Whether the Due Process Clause of the Fourteenth Amendment entitles an indigent defendant to the appointment, at state expense, of nonpsychiatric experts to assist in his defense at trial.

II.

Whether an indigent defendant was entitled under the Due Process Clause of the Fourteenth Amendment to the appointment of an expert at state expense absent a showing prior to trial that the expert assistance was likely to be a significant factor at trial.

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RESPONSE TO THE PETITION

I.

The Due Process Clause of the Fourteenth Amendment requires the appointment of an expert to assist an indigent defendant where it is reasonably probable that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial.

The Petition for Certiorari seeks to limit this Court's decision in Ake v. Oklahoma, 470 U.S. 68 (1985), to only those cases which are capital, and to only those experts who are psychiatric. The Petitioner suggests that there is a substantial conflict among the state and federal courts on this question and that the failure to so restrict the Ake decision will open up the floodgates of appellate and collateral criminal litigation. As demonstrated below, neither contention is accurate.

A. There is little, if any, conflict between the state and federal courts over the scope of the Ake decision.

The Petitioner has invoked this Court's discretionary powers in this case citing what he terms a "deepening conflict among the state and federal courts of this country." (Petition, p. 7). The Petition further alleges that at least eight states have adopted rules contrary to the decision of the Eighth Circuit, en banc. An analysis of this alleged "conflict" demonstrates that, far from a

division among the states, there is striking unanimity regarding the principles enunciated by the Eighth Circuit and differing results based only upon the application of specific factual circumstances. Thus, a grant of certiorari to "resolve the conflict" between the states is, for that reason, unnecessary.

Turning directly to those cases in which Petitioner perceives a conflict with the Eighth Circuit (Petition, p. 10), one is first struck by the fact that two of the eight cases cited involved a request for an appointed investigator, not an expert. **Rogers v. State**, 344 S.E.2d 644 (Ga.), cert. denied, 107 S.Ct. 600 (1986); **Pope v. Commonwealth**, 360 S.E.2d 352 (Va. 1987). That issue is not presented by the Petition herein.

The remaining six cases either assume that the Due Process Clause requires the appointment of expert assistance for indigent defendants or rely upon independent state law as satisfying the requirements of the Due Process Clause as interpreted in **Ake v. Oklahoma**, 470 U.S. 1087 (1985) and **Caldwell v. Mississippi**, 472 U.S. 320 (1985).

Two of the cases cited by Petitioner note that their statutes, as construed by the courts, provide for the appointment of expert witnesses to indigent defendants by the trial courts. **State v. Berry**, 707 P.2d 638 (Ore. 1985); **State v. Artis**, 342 S.E.2d 847 (N.C. 1986). In **State v. Berry**, the Court held that appointment of an expert was unnecessary because the subject matter of the expert testimony (Native American religion) had been properly held to be irrelevant. In **State v. Artis**, the Court held that the defendant had failed to make a particularized showing of need for the aid of a social psychologist to assist in jury selection.[1]

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[1] The defendant had erroneously argued that placing the burden of making a showing of need upon him violated **Ake v. Oklahoma**, supra, and **Caldwell v. Mississippi**, 472 U.S. 320 (1985). The North Carolina Supreme Court's rejection of this argument is consistent with the Eighth Circuit's approach of placing the burden upon the defendant to demonstrate a "reasonable probability that an expert would aid in his defense,

The remaining four states perceived by Petitioner as conflicting with the Eighth Circuit likewise found that the defendant in each had failed to show a need for the appointment of the expert or that the trial court's failure to appoint an expert, in the context of the trial, did not deprive the defendant of a fair trial. By example, these cases amply demonstrate that the trial and appellate courts are able to apply the precepts of **Ake** and **Caldwell** without further guidance from this Court. More importantly, none suggest that the holding in **Ake** is restricted to capital cases where the defendant's mental condition is an issue.

In **Plunkett v. State**, 719 P.2d 834 (Okla.Cr.App.), cert. denied, 107 S.Ct. 675 (1986), the Court held that the defendant was not denied the "basic tools" of a defense where the state's "expert" was a laboratory technician relating the results of tests, and the defendant called both a professor of microbiology and a professor of statistics to explain the results.[2] In **Schultz v. State**, 497 N.E.2d 53 (Ind. 1986), the court found no denial of a fair trial where the defendant had failed to request the appointment of experts until after the trial; the defendant did not seriously question the expert testimony; and witnesses independent of the scientific evidence tied the defendant to the crime. In **State v. Evans**, 710 S.W.2d 530 (Tenn.Cr.App. 1985), the Court upheld the trial court's refusal to appoint a ballistics expert, where there was no serious challenge to the competence of the state's expert or his results, the defendant took the stand and testified that he fired the gun in question, and independent witnesses confirmed the defendant's participation

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and that denial of expert assistance would result in an unfair trial." (App. A-7).

[2] **See**, **Stafford v. Love**, 726 P.2d 894 (Okla. 1986); and **Woodard v. State**, 743 P.2d 662 (Okla. Cr. App. 1987), Parks, J., dissenting at pp. 664-666.

in the crime. In Grayson v. State, 479 So.2d 69 (Ala.Cr.App. 1984), aff'd. sub nom. Ex Parte Grayson, 479 So.2d 76 (Ala. 1985), cert. denied, 106 S.Ct. 189 (1985), the Court held that the appointment of experts was unnecessary where the physical evidence was non-specific, its limitations fully explained to the jury, and the most damaging evidence consisted of the defendant's own statements.[3]

The Petitioner, in a footnote (Petition, p. 12, n.2), suggests that the Eleventh Circuit has taken a position contrary to that of the Eighth Circuit. However, the Eighth Circuit cited the same Eleventh Circuit case, Moore v. Kemp, 809 F.2d 702 (11th Cir.)(en banc), cert. denied, 107 S.Ct. 2192 (1987), as authority for its holding. (App. A7). Interestingly, the Petitioner, in quoting Moore v. Kemp, omits from the quotation the very next sentence which demonstrates that the two cases are in complete harmony:

> ...We question the wisdom of such due process requirements absent a substantial showing, such as the one made in Ake, of a significant benefit to the truth-seeking function of the trial.

809 F.2d at p. 712, footnote 8. (Emphasis supplied.)

The fact is that virtually every jurisdiction which has considered the question has found that fundamental fairness would require the appointment of expert witnesses for indigent defendants in certain circumstances. None have suggested the limitations proposed by Petitioner.

Rather the focus has been on the standard of need, and in that respect there is remarkable consensus in the requirement that the defendant demonstrate a "reasonable probability that an expert would aid in his defense and that denial of expert assistance would result in an unfair trial." (App. A-7). United States v.

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[3] In so holding the Alabama Court of Criminal Appeals stated, "We recognize that due process and fair play may demand the accused be furnished with the assistance of experts in preparing his defense." 479 So.2d at p. 72.

Brewer, 783 F.2d 841, 842 (9th Cir.), cert. denied, 102 S.Ct. 118 (1986); Johnson v. Harris, 682 F.2d 49, 51 (2nd Cir.), cert. denied, 459 U.S. 1041 (1982); Matlock v. Rose, 731 F.2d 1236, 1244 (4th Cir.), cert. denied, 470 U.S. 1050 (1985); State v. Tison, 633 P.2d 335, 342 (Ariz. 1981), cert. denied, 459 U.S. 882 (1982), reh. denied, 459 U.S. 1024 (1982); Pickens v. State, 652 S.W.2d 626, 626 (Ark. 1983); Corenevsky v. Superior Court, 682 P.2d 360, 367 (Cal. 1984); People v. Martinez, 734 P.2d 126, 130 (Colo. App. 1986); Van Arsdale v. State, 486 A.2d 1, 14 (Del. 1984), vacated on other grounds, ___ U.S. ___, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); State v. Hoopii, 710 P.2d 1193, 1195 (Hawaii 1985); State v. Olin, 648 P.2d 203, 206 (Idaho 1982); People v. Kinion, 454 N.E.2d 625, 631 (Ill. 1983); Palmer v. State, 486 N.E.2d 477, 481 (Ind. 1985); English v. Missidline, 311 N.W.2d 292 (Iowa 1981); Hicks v. Commonwealth, 670 S.W.2d 837, 838 (Ky 1984), cert. denied, 469 U.S. 1040 (1984); State v. Anaya, 456 A.2d 1255, 1262 (Me. 1983); Johnson v. State, 476 So.2d 1195, 1202-1203 (Miss. 1985); State v. Campbell, 498 A.2d 330, 332 (N.H. 1985); State v. Gardner, 319 S.E.2d 591, 598 (N.C. 1984), cert. denied, 469 U.S. 1230 (1985); State v. Hallman, 391 N.W.2d 191, 195 (S.D. 1986); State v. Melos, 713 P.2d 138 (Wash. App. 1986).

The Eighth Circuit's unanimous decision in this case is in accord with the substantial weight of decisions from other jurisdictions. For that reason, Petitioner has failed to demonstrate that there exists any conflict between the jurisdictions, deep or otherwise.

B. The Eighth Circuit has enunciated a standard which can be, and is now, easily applied by trial and appellate courts.

Petitioner's near-hysterical fears of "the spectre of motion after motion, hearing after hearing, expert after expert, fee

bill after fee bill" (Petition, p.12) are stated without reference anywhere in the argument to the actual standard enunciated by the Court of Appeals. Ironically, while criticizing the Eighth Circuit's rule in the first argument (Petition, p. 12), in his second argument Petitioner concedes that the Court of Appeals properly applied the standard required by Ake.

The danger of nonmeritorious litigation is greatest where no standard has been announced. When neither the parties nor the courts can ascertain the limits of the right conferred, the parameters are developed by litigating every case. Here, the Eighth Circuit has defined the standard clearly and, as demonstrated, above, the trial and appellate courts of the many jurisdictions are already applying the same standard with little apparent difficulty.[4]

Taken literally, Petitioner's argument suggests that a constitutional right should be denied because defendants will assert the right. The infirmity of such an argument is apparent and hardly constitutes a grounds for the grant of the Writ of Certiorari.

II.

The Eighth Circuit's holding that Respondent met his burden of demonstrating a reasonable probability that an expert in hypnosis would aid in his defense is fairly supported by the record at the time of trial.

Petitioner agrees that the Court of Appeals applied the standard required by Ake v. Oklahoma when it unanimously found that an expert in hypnosis would have substantially aided in the Respondent's defense and that the denial of the expert assistance

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[4] The Eighth Circuit defined the standard as follows:

> Ake and Caldwell taken together hold that a defendant must show more than a mere possibility of assistance from an expert. Rather, the defendant must show a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial.

(App. A7).

had a material impact on his trial. (Petition, p. 16). Petitioner seeks this Court's grant of certiorari based upon his disagreement with this finding.

Petitioner states that Respondent's request for the appointment of an expert in hypnosis "would help only to determine the 'suggestibility' of the victim during hypnosis". (Petition, p. 17, n.4). Petitioner argues that since there was no factual record of the hypnosis[5], there was no factual record any suggestibility. Since there was no factual record of suggestibility, Respondent's request for an expert to determine suggestibility is, according to Petitioner, an "undeveloped assertion." However, Petitioner has not fairly stated Respondent's request for assistance as reflected in the record which was before the Court of Appeals.

At the time of the hearing of Respondent's Motion for the Appointment of Expert, the trial court had before it the unrefuted content of the motion itself (App. A104-A107), the statement of counsel (A102) and, shortly thereafter, the "expert" testimony of the police hypnotist who, after being qualified as an expert, was permitted to testify generally regarding his theory of memory and hypnosis, and the propriety of his hypnosis of the victim.[6] In the Motion, counsel informed the trial court that:

> Prior to undergoing hypnosis, the prosecutrix M.B.G. said she did not see the assailant's face. Sometime after undergoing hypnosis administered by the state's "expert", M.B.G. was able to say she saw a portion of her assailant's face during the alleged rape and thereafter, was able to identify him by recognizing his face in a lineup and in a photo throwdown.

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[5] The partial tape recordings of one hypnotic session were deliberately destroyed by the police, giving rise to Respondent's claim of a violation of California v. Trombetta, 467 U.S. 479 (1984). No record of the second hypnosis was made.

[6] The Missouri Court of Appeals, which reversed Respondent's conviction, summarized in detail the hypnotist's testimony. (App. A55-58).

> At the trial and at a motion hearing to suppress statements, such expert would be essential to the defendant in the preparation and cross-examination of the state's expert and the prosecutrix M.B.G. Therein, the requested expert would help defendant effectively cross-examine the state's expert and M.B.G. as to the suggestibility of the hypnotic session and inform the trier of fact as to the problems inherent with hypnosis.

(App. A106). The defendant requested a "...trained psychiatrist or psychologist who is an expert in the administration of hypnosis, the techniques of an hypnotic interview and knowledgeable in the psychology of hypnosis and its effects on memory." (App. A106). At the time of the hearing defense counsel also stated to the Court:

> MR. ROBBINS: Judge, several of the motions, at least one of the motions which will be heard shortly, involve an hypnotic test performed by the Cape Girardeau Police Department. We are in a position to offer to this court law regarding hypnotic interviews. The suggestibility which relates to the total problem today, which will be identification testimony at the trial in April, we need such an expert--that expert being a psychiatrist or psychologist, whoever it is, who is versed in hypnosis, hypnotic interview, and the suggestibility which is inherent in that process...

(App. A102).

Thus, the trial court was on notice as to precisely the kind of expert Respondent requested, "the nature of prosecution's case and how the requested expert would be useful." Moore v. Kemp, 809 F.2d 702, 718 (11th Cir. 1987), cert. denied, 107 S.Ct. 2192 (1987). See, State v. Campbell, 498 A.2d 330, 332 (N.H. 1985).

In rejecting Petitioner's argument, below, the Court of Appeals stated:

> We are mindful of the finding of the Supreme Court of Missouri that there was simply no evidence of improper suggestiveness during any of the hypnotic sessions conducted in this case. It would follow that an expert would have contributed nothing useful. His testimony would simply have been irrelevant. Our impulse was to defer to this finding, but on reflection we conclude that we cannot. M.B.G. did not identify Little until after being hypnotized. She had

> glimpsed only the right profile of the criminal, and had done so only for a time period so short as to be described by the Missouri Supreme Court as "at least two seconds...." 674 S.W.2d at 542. The police hypnotist told her that hypnosis would improve her memory, and in fact her memory did later improve, or at least she thought it did. We think an expert witness could well have explained to the judge and jury how M.B.G. could have been influenced by improper suggestion, even without Lincecum's intending it or her realizing it. The conclusion that there was no improper suggestion or other taint could well itself have been different if Little had been given expert assistance.

(App. A10). (Emphasis supplied.)[7]

This carefully considered conclusion by the judges of the Eighth Circuit is fairly supported by the record in the state courts. Other than dissatisfaction with the result, Petitioner has offered no substantial reason for this Court to exercise its discretionary power of certiorari. As Petitioner has expressed no disagreement with the standard employed by the Eighth Circuit, Respondent respectfully suggests that Petitioner has stated no cause for the issuance of the writ.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that the Writ of Certiorari be denied.

Respectfully submitted:

TOBY H. HOLLANDER
Counsel for Respondent

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Lewiston, Maine 04240
(207) 784-1558

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[7] The use of expert testimony to explain the dangers inherent in hypnotically induced testimony was recognized by this Court in **Rock v. Arkansas**, ___ U.S. ___, 107 S.Ct. 2704, 97 L.Ed.2d 37, 52 (1987).